

MOORE v. HARPER

UNDERSTANDING THE IMPACTS OF THE DECISION

The United States Supreme Court has released an opinion in *Moore v. Harper* **rejecting the radical independent state legislature theory**. The Court explicitly affirms the role of state court judicial review in election regulation. The checks-and-balances built into our democracy are protected.



Rejects ISLT and protects checks and balances in federal elections

Reaffirms the roles courts play in our election processes.

Major win for voters

This decision is an outright victory: a complete rejection of the independent state legislature theory (ISLT) and a clear victory for American democracy. The Court not only rejected the radical arguments advanced by North Carolina legislators; they adopted the pro-democracy position in full.

The Court reaffirmed the fundamental role of state constitutions and state courts, ensuring that the actions of state legislatures must comply with their state constitution. This upholds the checks and balances at the core of our democracy.



“The Elections Clause does not vest exclusive and independent authority in state legislatures to set the rules regarding federal elections... When state legislatures prescribe the rules concerning federal elections, they remain subject to the ordinary exercise of state judicial review.” – *Moore v. Harper*

RESOURCES

- [Messaging Guidance](#)
- [Common Cause and SCSJ Press Release](#)

IMPACTS ON STATES

- 1. State courts can continue to exercise judicial review of redistricting election laws.** Future efforts to again advance the “independent state legislature theory” or to eliminate the typical role of state court judicial review of state legislative lawmaking will likely fail.
- 2. State courts remain the appropriate bodies to determine what is constitutional under state law and a viable avenue for judicial review of state laws governing federal elections.** State courts may implement remedial maps where there are violations of the law unless the state constitution expressly rejects that authority.
- 3. The United States Supreme Court will step in only if a state court exceeds the ordinary exercise of judicial review.**
- 4. *Moore v. Harper* cites earlier decisions that affirm the people’s right to use citizen initiative to adopt redistricting and election reforms,** including independent redistricting commissions. It also cites previous decisions that similarly affirm state lawmaking processes that require a governor’s signature.

ACTIONS STATES CAN TAKE

On the Role of State Courts

Although *Moore v. Harper* preserves state court judicial review, advocates in states *may* consider strengthening the provisions under state law and state constitutions to clearly enshrine the role of state courts in reviewing redistricting plans and to draw remedial maps. This may take the following forms:

- Amending the state constitution to authorize state courts to review disputes or challenges to redistricting plans and implement remedial maps.
- Passing a statute that authorizes state courts to review disputes or challenges to redistricting and to implement remedial maps where necessary.
 - » Depending on the composition of the state legislature, this may or may not be a straightforward addition to state law. This may be less protective than an amendment to a state's constitution, as a statute would be more easily repealed, but the specific circumstances of a state may change this analysis.

Some states already have an express authorization for state court judicial review of congressional redistricting in statute or in the state constitution. These states include Alabama, California, Colorado, Connecticut, Hawaii, Iowa, Maine, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Oregon, Virginia, and Washington. (See *endnote for state-by-state information about existing constitutional or statutory text*).¹

On Partisan Gerrymandering

There is still work that must be done in the states to stop partisan gerrymandering in future redistricting cycles, particularly in states without existing protections. Although the Supreme Court has rejected ISLT, existing precedent still precludes challenging partisan gerrymandering in federal courts, leaving state courts as a key avenue for such challenges. Actions to eliminate partisan gerrymandering may include:

In the States

- Establish an explicit ban on partisan gerrymandering in state law or in the state constitution.
 - » Fourteen states have such bans including Arizona, California, Colorado, Florida, Hawaii, Idaho, Iowa, Michigan, New York, Ohio, Oregon, Utah, Virginia, and Washington.
- The enactment of an independent redistricting commission that removes the ability of state legislators and politicians from influencing the redistricting process.
 - » Nine states already empower redistricting commissions to initially draw and implement redistricting plans: Alaska, Arizona, California, Colorado, Idaho, Michigan, Montana, New York, and Washington, however, commissions in New York and Washington may be overridden by a legislative supermajority. Alaska only has one congressional district.
- If the state has unique language in its state constitution, such as a free elections, free and fair elections, or fair elections clause (or corresponding equal protection clause), a state court may be able to draw on the tradition of those clauses and normal tools of judicial interpretation to adjudicate partisan gerrymandering challenges.
 - » Most recently, the Alaska Supreme Court held that the equal protection provision of its state constitution protects against partisan gerrymandering.
 - » The Pennsylvania Supreme Court and a Maryland state trial court have ruled that partisan gerrymandering violates their state constitutions' free elections clause.
 - » This approach would require an assessment of the history of these clauses, how it has been previously interpreted by state courts, and whether state constitutional provisions provide additional protections beyond its corresponding federal provisions.
 - » Twenty-eight states have constitutional language protecting "free" or "free and equal" elections, including Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

In Congress

- Congressional action to enshrine voter protections into federal law is still necessary, including the John Lewis Voting Rights Advancement Act (VRAA) and the Freedom to Vote Act.
 - » Regulations by Congress are permitted under the United States Constitution's Elections Clause and would be the most protective action that may be taken.

ENDNOTE COVERING AUTHORITY OF STATE COURTS

- 1 This endnote covers the current landscape of state constitutional or statutory text regarding the authority of state courts:
 - States that currently have express authorization for state court judicial review of both congressional and state legislative redistricting: **Alabama** [Ala. Code § 29-1-2.5(a) (statutory)]; **California** [Cal. Const. art. XXI, §§ 2(j), 3(b) (constitution)]; **Colorado** [Colo. Const. art. V, §§ 44.5, 48.3 (constitution)]; **Connecticut** [Conn. Const. art. III, § 6 (constitution)]; **Hawaii** [Haw. Const. art. IV, § 10 (constitution)]; **Iowa** [Iowa Const. art. III, § 36 (constitution)]; **Maine** [Me. Const. art. IV, pt. 1, § 3; pt. 2, § 2 (for state legislative apportionment) (constitution); Me. Rev. Stat. tit. 21-A, § 1206 (for congressional apportionment) (statutory)]; **Massachusetts** [Mass. Const. amend. art. CI, § 3 (for state legislative redistricting) (constitution); 2011 Mass. Legis. ch. 177, § 10 (H. 3798) (for congressional redistricting) (statutory)]; **Michigan** [Mich. Const. art. 4, §6 (constitution)]; **New Jersey** [N.J. Const. art. II, § 2, ¶ 7 (constitution)]; **New York** [N.Y. Const. art. III, § 5 (constitution)]; **North Carolina** [N.C. Stat. §§ 1-81.1, 1-267.1, 120-2.4 (statutory)]; **Ohio** [Ohio Const. art. XI, § 9; art. XIX § 03 (constitution)]; **Oregon** [Or. Const. art. IV, § 6 (for state legislative redistricting) (constitution); Or. Rev. Stat. § 188.125 (for congressional redistricting) (statutory)]; **Virginia** [Va. Const. art. II, § 6-A; Va. Code Ann. § 30-400 (constitution and statutory) (assumes possibility of court review in text, not fully explicit)]; and **Washington** [Wash. Rev. Code § 44.05.130 (statutory)].
 - States that have state court judicial review of congressional redistricting plans based on court precedent or current court review:
 - » The following states have state court judicial review of redistricting plans based on authority established through state courts finding they hold jurisdiction over such matters. The state court’s own finding of judicial review authority may be insufficient depending on future Supreme Court rulings in ISLT.
 - **Potential Action**: These states that currently have judicial review based on court precedent may require action to affirmatively enact statutory reforms or new constitutional language that recognizes state court judicial review of congressional redistricting plans.
 - » **Arizona** [Ariz. *Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 220 Ariz. 587, 208 P.3d 676 (2009)]
 - Although Arizona has an independent redistricting commission, the provisions under the state constitution establishing the commission do not include language regarding judicial review. The Arizona Supreme Court, however, has heard challenges regarding the commission and found it held jurisdiction to do so.
 - In *Ariz. Minority Coal. v. Ariz. Indep. Redistricting Comm’n*, the state supreme court held it finds “that the Commission acts as a legislative body,” therefore “a redistricting plan receives the same deference as we afford to other legislation,” and thus “judicial relief becomes appropriate only when a legislature fails to reapportion according to... constitutional requisites.” In treating the product of the redistricting commission as legislation, it provides the state court authority to do such review.
 - » **Florida** [*League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015)]
 - Florida has an explicit delegation for state supreme court review of its state legislative redistricting, but not of congressional redistricting. Fla. Const. Art. 3 § 16.
 - Florida state courts have decided on the constitutionality of past congressional redistricting plans, and later implemented a remedial map drawn by the courts. See *LWV of Florida*. See also *League of Women Voters of Fla. v. Data Targeting, Inc.*, 140 So. 3d 510 (Fla. 2014) (accepting jurisdiction and considering a constitutional writ in this congressional redistricting challenge).
 - » **Maryland** [*Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct., Anne Arundel Cnty. Mar. 25, 2022)]
 - Maryland’s state courts have original jurisdiction to review state legislative redistricting under the state constitution. Md. Const. art. III, § 5. This authority, however, does not extend to congressional redistricting.
 - Congressional redistricting in the state is enacted as a regular statute, subject to a gubernatorial veto. While state courts regularly review state legislative redistricting in the state, it does not do so for congressional redistricting. See *e.g.*, *In re 2022 Legislative Districting of the State*, 481 Md. 507, 282 A.3d 147 (2022) (considering the constitutionality of the state legislative redistricting plan).
 - During this redistricting cycle, however, a state court did consider whether the congressional redistricting statute, as passed by the state legislature, was a product of partisan gerrymandering that violated the state constitution. In this case, the trial court held jurisdiction over reviewing the state congressional redistricting plan, considering it as a statute, in the context of whether it violated the state constitution.
 - » **Minnesota** [*Wattson v. Simon*, No. A21-0243 (Minn. Feb. 15, 2022)]
 - While the state legislature has the authority to draw redistricting plans in Minnesota, across the last few redistricting cycles, the redistricting process fell to state courts as there was an impasse using the constitutionally prescribed method of drawing lines.
 - » **Nevada** [See *Guy v. Miller*, No. 11 OC 00042 1B (Nev. Dist. Ct., Carson City Oct. 27, 2011)]
 - There is nothing explicitly outline in the Nevada state constitution or under state law regarding court involvement in redistricting. However, a state court had to step in to draw state legislative and congressional lines after a legislative impasse in 2011.
 - There was a current state court challenge against the state’s state legislative congressional maps for this redistricting cycle, and though the case was ultimately dismissed, the trial court in a order denying preliminary injunction did accept that the court has the authority to construe redistricting statutes to be “in harmony” with the state constitution. See *Koenig v. Nevada*, No. 21-OC-00166-1B (Nev. Dist. Ct., Carson City).

- » **New Hampshire** [*Norelli v. Sec. of State*, 175 N.H. 186 (2022)]
 - New Hampshire does not have anything explicitly outlined in the state constitution or under state law authorizing state court judicial review.
 - In the 2022 redistricting cycle, the state supreme court held that the court has jurisdiction to rule on the constitutionality of a congressional redistricting plan, as well as to implement a remedial plan if the current plan is unconstitutional and the state legislature fails to act in a timely manner. *See Norelli*.
- » **New Mexico** [*Republican Party of New Mexico v. Oliver*, No. D-506-CV-202200041 (N. M. 5th Dist.)]
 - There is no explicit delegation of judicial review under New Mexico state law or the state constitution for redistricting plans, which are passed by the state legislature as a typical statute. However, a state court is currently considering the constitutionality of the current congressional map.
- » **New York** [*Matter of Harkenrider v. Hochul*, 2022 NY Slip Op 02833, 38 N.Y.3d 494 (2022)]
 - The New York state constitution makes clear that an apportionment shall be subject to review by state courts. N.Y. Const. art. III, § 5. New York is only included here because this application was clarified through an interpretation of the state constitution in this recent case.
 - In this redistricting cycle in *Matter of Harkenrider*, New York state courts considered the constitutionality of the state’s congressional maps. The highest state court interpreted the state constitution to allow state courts to review congressional redistricting (not just state legislative), allowing any citizen to seek judicial review of a legislative act establishing electoral districts, and also allows state courts to have “judicial oversight of remedial action in the wake of a determination of unconstitutionality.”
- » **Oklahoma** [*Alexander v. Taylor*, 51 P.3d 1204 (Okla. 2002)]
 - Oklahoma has an explicit delegation of judicial review only for state legislative redistricting. Okla. Const. art. V, § 11C.
 - However, the state supreme court has clearly held that there is jurisdiction in state courts to craft state legislative and congressional redistricting plans where the state legislature has failed. *See Alexander*.
- » **Pennsylvania** [*Carter v. Chapman*, 270 A.3d 444 (Pa. 2022)]
 - Pennsylvania’s state constitution also has state court judicial review of state legislative redistricting, directly appealable to the state supreme court. No such language exists for congressional redistricting.
 - In this redistricting cycle, however, the state supreme court did assume plenary jurisdiction over an impasse dispute between the state legislature and the state governor. The state supreme court implemented a congressional map in February 2022. *See Carter*.
- » **Wisconsin** [*Johnson v. Wis. Elections Comm’n*, 2022 WI 14]
 - While Wisconsin’s state laws are silent as to the role of state court judicial review, in this redistricting cycle the state supreme court adopted congressional and state legislative maps.
 - In earlier proceedings of the same case, the Wisconsin Supreme Court held that they were hearing the challenges to congressional and state legislative districts based on their original jurisdiction. *See Johnson v. Wis. Elections Comm’n*, 2021 WI 87.
- States that currently have explicit state court judicial review of state legislative redistricting but *not* congressional redistricting:
 - » **Arkansas** [AR Const. Art. 8, § 5]; **Florida** [Fla. Const. Art. 3 § 16]; **Idaho** [Idaho Const. art. III, § 2(5)]; **Illinois** [Ill. Const. art. IV, § 3]; **Indiana** [Ill. Const. art. IV, § 3]; **Kansas** [Kan. Const. art. X, § 1]; **Kentucky** [Ky. Rev. Stat. § 5.005]; **Louisiana** [La. Const. art. III, § 6]; **Maryland** [Md. Const. art. III, § 5]; **Missouri** [Mo. Const. art. III, §§ 3, 7]; **Oklahoma** [Okla. Const. art. V, § 11C]; **Pennsylvania** [Pa. Const. art. II, § 17]; **Texas** [Tex. Const. art. III, § 28].
 - » The states listed in this bullet point have specific language under the state constitution or under state law that permits state court judicial review of its state legislative redistricting plans but does not have corresponding language permitting judicial review of congressional redistricting.
 - » **Potential Actions:** Extend such authority to state courts for congressional redistricting:
 - Amending the state constitution to authorize the state’s court system to review disputes or challenges to congressional redistricting plans.
 - Passing a statute that specifically authorizes the state’s court system to review disputes or challenges to congressional redistricting plans enacted by its legislative body or commission.
- States that currently have no provisions under the state constitution, under state law, or in court precedent for state court judicial review of redistricting: Delaware, Georgia, Mississippi, Montana, Nebraska, North Dakota, Rhode Island, South Carolina, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming.
 - » **Potential Actions:** Extend judicial review authority to state courts for congressional redistricting:
 - Amending the state constitution to authorize the state’s court system to review disputes or challenges to congressional redistricting plans.
 - Passing a statute that specifically authorizes the state’s court system to review disputes or challenges to congressional redistricting plans enacted by its legislative body or commission.
- States that only have one congressional district: Alaska, Wyoming, North Dakota, South Dakota, Vermont, and Delaware.
 - These states may be listed above under various provisions based on their state laws or state constitutions, but they currently only hold one congressional district, thus there would be little impact of the limitations on state court judicial review of congressional redistricting plans.